

FILED JUN 27 2019

Scott E. Hickman Clerk

COMMONWEALTH OF MASSACHUSETTS

BARNSTABLE, ss.

SUPERIOR COURT

DOCKET NO.:

OHHARSH CORP. d/b/a AM PM CONVENIENCE)
STORE, CHETAN PATEL, M.A. GENERAL, INC.,)
d/b/a SEA STREET FOOD MART,)
ZAHID RASHID, NOOR, INC. d/b/a HYANNIS)
CONVENIENCE STORE, and)
MUHAMMAD RASHID,)

Plaintiffs,

v.

PAUL J. CANNIFF, D.M.D, JOHN NORMAN, and)
DONALD A. GUADAGNOLI, M.D., as they are)
Members of the Town of Barnstable Board)
of Health,)

Defendants.

**COMPLAINT AND PRAYER FOR
DECLARATORY RELIEF PURSUANT TO M.G.L. c. 231A, § 1,
AND FOR CERTIORARI REVIEW PURSUANT TO M.G.L. c. 249, § 4**

Parties

1. The Plaintiff, OHHARSH CORP., is a Massachusetts corporation doing business as AM PM CONVENIENCE (hereinafter "Plaintiff" and/or "AM PM CONVENIENCE"), a convenience store located at 489 Bearses Way, Hyannis, Massachusetts.

2. The Plaintiff, Chetan Patel ("Mr. Patel"), is an owner and Director of AM PM CONVENIENCE. Mr. Patel resides in Bourne, Massachusetts.

3. The Plaintiff, M.A. GENERAL, INC., is a Massachusetts corporation doing business as SEA STREET FOOD MART (hereinafter "Plaintiff" and/or "SEA STREET"), a convenience store located at 231 Sea Street, Hyannis, Massachusetts.

4. The Plaintiff, Zahid Rashid ("Mr. Z. Rashid"), is the owner and President of SEA STREET. Mr. Z. Rashid resides in Forestdale, Massachusetts.

5. The Plaintiff, NOOR, INC., is a Massachusetts corporation doing business as HYANNIS CONVENIENCE STORE (hereinafter "Plaintiff" and/or "HYANNIS CONVENIENCE"), a convenience store located at 631 Main Street, Hyannis, Massachusetts.

6. The Plaintiff, Muhammad Rashid ("Mr. M. Rashid"), is the owner and President of HYANNIS CONVENIENCE. Mr. M. Rashid resides in Forestdale, Massachusetts.

7. The Defendant, Paul J. Canniff, D.M.D., ("Dr. Canniff"), is a resident of the Town of Barnstable and Chair of the Town of Barnstable Board of Health (the "Board"), located at 200 Main Street, Hyannis, Massachusetts.

8. The Defendant, John Norman ("Mr. Norman"), is a resident of the Town of Barnstable and Chair of the Town of Barnstable Board of Health (the "Board"), located at 200 Main Street, Hyannis, Massachusetts.

9. The Defendant, Donald A. Guadagnoli, M.D., ("Dr. Guadagnoli"), is a resident of the Town of Barnstable and Chair of the Town of Barnstable Board of Health (the "Board"), located at 200 Main Street, Hyannis, Massachusetts.

Facts

10. The Board is an agency of the Town government in Barnstable and consists of three (3) elected members. Currently, the Board consists of Dr. Canniff, Mr. Norman and Dr. Guadagnoli.

11. In or about November of 2018, the Board voted to increase the minimum legal sales age for tobacco and nicotine products from eighteen (18) years of age to twenty-one (21) years of age. That regulation took effect on December 30, 2018. See Board Regulation, Effective

December 30, 2018 (the "2018 Regulation"). A true and accurate copy of the 2018 Regulation is attached hereto as Exhibit A.

12. On or about May 15, 2019, the Board held a public meeting, styled a "Workshop" to discuss certain proposed changes to the 2018 Regulation, concerning the "sales of flavored tobacco products and flavored nicotine products[.]" (hereinafter the "May Workshop").¹

13. At the May Workshop, the Board permitted a lengthy presentation by certain advocates of the regulations, namely, Bob Collett ("Mr. Collett") of the Cape Cod Regional Tobacco Control Program, Cheryl Sbarra ("Ms. Sbarra"), Senior Staff Attorney with the Massachusetts Association of Health Boards, and Sarah McColgan ("Ms. McColgan") of the Massachusetts Health Offices Association ("MHOA"). According to the Board's public notice for the May Workshop, the primary presentation allowed by the Board was prepared by Mr. Collett and Ms. Sbarra. Mr. Collett, however, performed the presentation, which was followed by additional comments from Ms. McColgan.

14. The Board then briefly described, in general terms, the nature of the proposed amendments to the 2018 Regulation, showing slides of the proposed, added sections to the 2018 Regulation. The Board did not make clear, however, whether the proposed changes would affect flavored e-cigarette products in addition to flavored tobacco products.

15. Thereafter, the Board invited members of the public to provide comments on the proposed regulation. During the public comment portion of the meeting, the Board permitted Mr. Collett to answer some of the questions raised by the public with respect to the Board's proposed regulation.

¹ https://www.townofbarnstable.us/Boards/Committees/BoardofHealth/Agendas/2019/051519_Agenda_Workshop_Flavored_Tobac.pdf (last visited June 26, 2019).

16. The Board did not take any vote at the May Workshop with respect to the proposed regulation. Instead, the Board made a motion to place the proposed regulation on the Board's May 28, 2019 public hearing agenda, which the Board unanimously approved.

17. On or about May 28, 2019, the Board held a public hearing during which it voted to approve its proposed amendments to the 2018 Regulation (the "May Hearing"). At the May Hearing, more specifically, the Board voted to prohibit a certain class of retailers, including traditional convenience stores, liquor stores, and gas stations (hereinafter "Retail Tobacco Stores"), from selling tobacco and/or nicotine products containing any characterizing flavor, including mint, menthol, or wintergreen (the "2019 Regulation"). The Board further voted to establish the effective date for said 2019 Regulation as June 29, 2019.

18. Prior to the Board's vote at the May Hearing, the Board permitted a lengthy presentation by another advocate of the proposed 2019 Regulation. Specifically, a presentation was given by Dr. Jeffrey Spillane, a thoracic surgeon with surgical experience relating to smoking-related lung cancers. Only after Dr. Spillane completed his presentation were members of the public invited to provide comment.

19. At the May Hearing, the Board again failed to clarify whether the adopted changes would affect flavored e-cigarette products in addition to flavored tobacco products. On information and belief, the Board did not publicize, post, or distribute a written copy of the 2019 Regulation in any form. Additionally, on information and belief, several retailers commented to the Board, after the close of the May Hearing, that the June 29, 2019 effective date was unfair given that it would not permit the retailers to divest themselves of already purchased, and soon to be prohibited inventory, which was purchased prior to the Board's consideration of any proposed regulatory amendments.

20. The Board thereafter, on or about May 29, 2019, issued a "Legal Notice," clarifying the scope of the 2019 Regulation and the changes that said Regulation would impart with respect to the original 2018 Regulation. See Legal Notice, dated May 29, 2019 (the "Legal Notice"). The Legal Notice further confirmed the June 29, 2019 effective date of the 2019 Regulation. A true and accurate copy of the Legal Notice is attached hereto as Exhibit B.

21. Subsequently, the Board held a public meeting on or about June 25, 2019, during which the Board was scheduled to discuss the "[r]equest for extension on effective date of amended regulation[,]"² (the "June Meeting"). Shortly before the meeting, however, on information and belief, Cumberland Farms, Inc. filed suit in the Suffolk Superior Court against, *inter alia*, the Town of Barnstable Board of Health with respect to the Board's approval of the 2019 Regulation (the "Cumberland Litigation"). Consequently, on information and belief, during the June Meeting, the Board voted to continue the enforcement of the 2019 Regulation until July 28, 2019 specifically because of the pending Cumberland Litigation.

A Deficient Process and Forgone Conclusion.

22. Although both the May Workshop and the May Hearing were ostensibly open to the public, the Board did not permit an open and fair discussion of the 2019 Regulation.

23. The Health Division of the Town of Barnstable (the "Health Division") permitted lengthy, formal presentations by tobacco regulation advocacy groups. These presentations had clearly been planned in coordination with the Board and/or the Health Division, as the presentations were given using the audio-visual equipment present in the Board's hearing room.

² See https://townofbarnstable.us/BoardsCommittees/BoardofHealth/Agenda/2019/062519_Agenda_Final2.pdf (last visited June 26, 2019).

24. Upon information and belief, the Board and/or the Health Division invited certain proponents of the 2019 Regulation to prepare, submit, and present formal statements in support of the proposed regulation. As noted above, among said advocates were: Mr. Collett, Ms. Sbarra, Ms. McColgan, and Dr. Spillane. Upon further information and belief, said prepared statements and the Board's ensuing discussion included anecdotal evidence in support of the proposed regulation without citation to reliable data, supporting authorities and/or scientific sources.

25. Although the facts presented to the Board in opposition to the proposed amendments to the 2018 Regulation deserved careful consideration, they appeared to receive none at all. After receiving certain comments in opposition to the proposed amendments to the 2018 Regulation, the Board would often defer to the advocates and invite them to rebut such oppositional statements. No such invitation to rebut the advocates statements was afforded to the members of the public who opposed the proposed amendments to the 2018 Regulation.

26. Moreover, during and/or before both its May Workshop and May Hearing, the Board was presented with documentary evidence in opposition to the proposed expansion of the 2018 Regulation. The Board did not appear to consider, review, or take that evidence into account. By ignoring the relevant facts and clearly favoring the comments and testimony provided by the proponents of the 2019 Regulation, the Board revealed that its vote was both unfairly biased and pre-determined.

27. As further evidence of the pre-determination of the Board's posture with respect the proposed amendments, the Board unanimously voted at the close of its May Hearing to approve the 2019 Regulation, without further review or study of the substantial volume of new and important scientific information and data presented at said Hearing.

An Arbitrary, Capricious, and Dangerously Harmful Regulation.

28. By statute, M.G.L. c. 111 § 31, municipal boards of health may promulgate only "reasonable health regulations." The 2019 Regulation is anything but reasonable.

29. The 2019 Regulation distinguishes between an "Adult-Only Retail Tobacco Store" and all other classes of tobacco retailers, i.e. Retail Tobacco Stores, which the 2019 Regulation does not define, and which is therefore comprised of all retailers of tobacco which do not fall within the definition of Adult-Only Retail Tobacco Store. See Exhibit A, Article I, Definitions.³

30. Under the 2019 Regulation, an Adult-Only Retail Tobacco Store is "[a]n establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco and paraphernalia in which the sale of other products is merely incidental, and in which the entry of persons under the age of 21 is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the Barnstable Board of Health." See Exhibit A, Article I, Definitions.

31. The 2019 Regulation, as indicated in the Legal Notice in conjunction with the un-amended terms of the 2018 Regulation, in pertinent part, provides as follows:

- a. "Tobacco Product" is defined, in pertinent part, as: "[a]ny product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or aerosolization." See Exhibit A, Article I, Definitions.

³ While the definition of Adult Only Retail Tobacco Store was included in the 2018 Regulation, its import was not realized until the approval of the 2019 Regulation, which actually restricts the sales of flavored tobacco and electronic cigarette products to said Adult Only Retail Tobacco Stores. See Exhibit B, Section G.

- b. "Flavored Tobacco Product" is defined, in pertinent part, as: "[a]ny tobacco product or component part thereof that contains a constituent that has or produces a *characterizing flavor*." See Exhibit B. (Emphasis supplied).
- c. "Characterizing Flavor" is defined, in pertinent part, as: "[a] distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component part thereof, including, but not limited to, tastes or aromas relating to fruit, chocolate, vanilla, honey, candy, cocoa, dessert, alcoholic beverage, *menthol*, *mint*, *wintergreen*, herb or spice..." See Exhibit B. (Emphasis supplied).
- d. "No person shall sell or distribute or cause to be sold or distributed any flavored tobacco product, except in smoking bars and adult-only retail tobacco stores." See Exhibit B, Section G. (Emphasis supplied).

32. The 2019 Regulation prohibits Barnstable Retail Tobacco Stores from selling all flavored tobacco and nicotine products, including those of the mint, menthol and wintergreen varieties, thereby removing all such flavored products—whether combustible, non-combustible, or electronic—from Barnstable Retail Tobacco Store shelves, and restricting the sale of such flavored products to Adult-Only Retail Tobacco Stores.

33. In short, the 2019 Regulation, as now written:

- a. prohibits Barnstable Retail Tobacco Stores from selling combustible menthol cigarettes;
- b. prohibits Barnstable Retail Tobacco Stores from selling non-combustible, electronic cigarette products of all flavors, including those of the mint, menthol and wintergreen variety; and
- c. prohibits Barnstable Retail Tobacco Stores from selling all flavored non-combustible tobacco products, including those of the mint, menthol and wintergreen variety, including moist, smokeless tobacco products like chewing tobacco, dipping tobacco, or snus;

34. Adult-Only Retail Tobacco Stores, however, are permitted to continue selling flavored tobacco products, including, without limitation, all manner of e-cigarettes, mentholated combustible cigarettes, and flavored smokeless tobacco products.

35. There are approximately sixty-one (61) tobacco retailers in the Town of Barnstable, including the Plaintiffs, that will be adversely affected by the 2019 Regulation, which is scheduled to take effect on July 28, 2019.

36. There are an unknown number of Adult-Only Retail Tobacco Stores located in the Town of Barnstable. Upon information and belief, there may be approximately four (4) such stores within the Town.

37. The 2019 Regulation will have the effect of significantly and irreparably harming the Plaintiffs through the interference with existing customer relations, existing customer purchasing activity, and loss of business income, which cannot be recovered from the Town, a sovereign entity.

38. Generally, tobacco-related product sales often represent up to approximately fifty (50) percent of total convenience in-store sales, like those of the Plaintiffs. Mint, menthol and wintergreen flavored tobacco products in particular (whether combustible or noncombustible) constitute a very significant stream of income for each of the Plaintiffs' stores, representing approximately thirty (30) percent of overall tobacco sales.

39. Further, the Plaintiffs stand to lose significant revenue related to items typically purchased in conjunction with tobacco products — otherwise known as the "market basket." Customers of the Plaintiffs purchasing the subject flavored tobacco and nicotine products often purchase additional food and beverage items. By prohibiting the sale of flavored tobacco and nicotine products—particularly mint, menthol and wintergreen products—the Plaintiffs' loss of revenue will be exponentially increased by the loss of associated market basket sales.

40. Based on the above sales data, menthol, mint and wintergreen flavored cigarettes and related tobacco products alone generally account for approximately 15% or more of total in-store sales for convenience stores like those operated by the Plaintiffs.

41. For the Plaintiffs, the percentage of total in-store sales of flavored tobacco products is significantly higher than the foregoing industry norms, ranging from approximately 20-25% of total in-store sales for Sea Street, 25-30% for AM PM Convenience, to approximately 45% of total in-store sales for Hyannis Convenience.

42. Once the 2019 Regulation takes effect, the affected Retail Tobacco Stores, including Plaintiffs, will lose the foregoing revenue stream. In the convenience store business, where competitors and alternative sales outlets abound, inside Barnstable and in all abutting and neighboring towns, and further where the margins on many products are low, losing the substantial revenue associated with these tobacco-related products could render Plaintiffs' business unprofitable and cause them to permanently go out of business.

43. Convenience stores, gas stations, liquor stores and other similar Retail Tobacco Stores, serve consumers who predominantly live, work, and/or commute in close proximity to the location of the stores.

44. The 2019 Regulation will dramatically and permanently change consumer shopping habits relating to convenience stores, gas stations, liquor stores and other similar Retail Tobacco Stores in Barnstable. Adult tobacco users who previously purchased menthol, mint and wintergreen flavored tobacco and related products, including e-cigarettes, from any of the sixty-one (61) Retail Tobacco Stores in Barnstable, and who wish to continue to purchase such products, will be forced to patronize any one of the myriad of competing retailers outside of the Town's

jurisdiction where no similar regulations apply. This will result in new purchasing habits of the Plaintiffs' existing customer base.

45. The 2019 Regulation will also cause inconvenience to adult tobacco users and consumers who wish to purchase menthol, mint and wintergreen flavored tobacco and related products, including e-cigarettes, interfering with the Plaintiffs' existing customer relationships and causing a decline in such customer visits, in-store purchases and a resulting loss of goodwill between the Plaintiffs and their customers.

46. The 2019 Regulation purports to be motivated by a concern to curb underage tobacco use, but there is no compelling evidence that the Plaintiffs or other Retail Tobacco Stores in the Town of Barnstable have sold tobacco products — flavored or unflavored — on any significant scale, or in any systemic fashion, to underage individuals.

47. In fact, according to the Massachusetts Department of Public Health Tobacco Cessation and Prevention Program, "[t]he rate of illegal sales to minors (those under the age of 18) is 43% lower in Barnstable (4%) compared to the state of Massachusetts (7%) based on data from fiscal year 2018."⁴

48. Additionally, according to the United States Food and Drug Administration ("FDA"), from 2018 to the present, Barnstable retailers complied with the age-restrictions on tobacco products in 57 out of 60 inspections since 2018, for a compliance rate of 95%.⁵

49. Because Barnstable has only approximately four (4) Adult-Only Retail Tobacco Stores, and because such stores are relatively new establishments in the retail tobacco market, this demonstrated history of compliance with existing tobacco sales regulations, at the very high rate

⁴ See, <https://makesmokinghistory.org/wp-content/themes/makesmokinghistory/tafi/pdf/LABEL-Barnstable.pdf> (last visited June 26, 2019).

⁵ https://www.accessdata.fda.gov/scripts/cdrh/cfdocs/cf/inspections/occe_insp_searching.cfm (last visited June 26, 2019).

of 95%, can be asserted only by the Retail Tobacco Stores like those of the Plaintiffs. **Adult-Only Retail Tobacco Stores**, on the contrary, have no substantial history of compliance in Barnstable.

50. Put differently, the 2019 Regulation prohibits Retail Tobacco Stores from selling flavored tobacco products despite their recent, near-perfect record of compliance with age restrictions, while permitting Adult-Only Retail Tobacco Stores to sell those very same products completely unfettered, despite the absence of meaningful data regarding their rate of compliance or their capability (or incapability) to prevent illegal sales to minors in Barnstable.

51. Pursuant to M.G.L. c. 64C § 2, tobacco retailers in the Commonwealth of Massachusetts must be licensed. The Plaintiffs have met all statutory requirements and are duly licensed to sell cigarettes and other tobacco products. The Office of the Attorney General has promulgated additional regulations regarding the retail sale of tobacco products. By way of example, 940 C.M.R. 21.04(3)(a) and (b) require all tobacco retailers to implement and operate "a training program for all employees who handle exchanges of cigarettes, smokeless tobacco products, or electronic smoking devices regarding compliance with laws and/or local ordinances prohibiting the sale of such products to minors." The Plaintiffs have met this regulatory requirement and have properly trained all relevant employees.

52. As a result of those efforts, the Plaintiffs are informed, and in good faith believe, that neither their stores nor other Retail Tobacco Stores in Barnstable, facilitate the sale of tobacco products to underage individuals.

53. The 2019 Regulation lacks any demonstrable connection to the promotion of public health in the Town of Barnstable. Indeed, the flavor ban itself has no rational connection to the stated purpose of the 2019 Regulation, which apparently is to reduce underage tobacco and

nicotine use. Where there is no reliable evidence that the Barnstable Retail Tobacco Stores serve as a material source for Barnstable minors to obtain tobacco or nicotine products, and the ban only has the practical effect of removing the flavored products from said Retail Tobacco Stores, the 2019 Regulation represents only a futile, symbolic gesture that will not reduce underage tobacco and nicotine use in Barnstable.

54. The 2019 Regulation will accomplish nothing to curb actual sales of the specific menthol, mint, and wintergreen flavored tobacco and nicotine products that it identifies as posing a particular danger. Further, the 2019 Regulation allows such sales to continue in Barnstable, so long as the sales take place at an Adult-Only Retail Tobacco Store.

55. The only distinctions that the 2019 Regulation draws between Retail Tobacco Stores, which will be prohibited from selling flavored tobacco and nicotine products, including those of the menthol, mint, and wintergreen varieties, and Adult-Only Retail Tobacco Stores, where such sales are permitted, is that Adult-Only Retail Tobacco Stores are "not required to possess a retail food permit" and "entry of persons under the minimum legal sales age is prohibited at all times." These distinctions make no discernible difference and are not rationally related to the ostensible goal of promoting public health. In effect, the 2019 Regulation arbitrarily punishes convenience stores, gas stations, liquor stores and other Retail Tobacco Stores for engaging in lawful food sales, without even attempting to show that food sales cause, encourage or are correlated with the sale of menthol, mint, and wintergreen flavored tobacco products and e-cigarettes to underage consumers. Indeed, whether such sales are conducted at Retail Tobacco Stores or Adult-Only Retail Tobacco Stores, the very same rules apply: all tobacco sales in the Town of Barnstable are prohibited to consumers under the age of twenty-one (21).

56. Instead of enhancing or promoting public health and safety, the 2019 Regulation impairs it. By taking the majority of e-cigarette products out of Retail Tobacco Stores, the 2019 Regulation will cause an increase in adult tobacco use of combustible cigarettes (e.g., Marlboro or Camel brand varieties), which are associated with more dangerous health consequences. By taking these e-cigarette products out of Retail Tobacco Stores, the 2019 Regulation will impair adult tobacco users' opportunity to quit the use of combustible cigarettes.

57. In or about February, 2018, the American Cancer Society issued a Position Statement on E-Cigarettes.⁶ According to the Position Statement, "Combustible tobacco products, primarily cigarettes, are the single greatest cause of cancer and kill about 7 million people worldwide each year. In the United States, 98% of all tobacco-related deaths are caused by cigarette smoking." The Position Statement goes on to observe that, "[b]ased on currently available evidence, using current generation e-cigarettes is less harmful than smoking cigarettes...." Accordingly, the American Cancer Society concludes that, although it is preferable for smokers to quit "cold turkey," those who will not stop smoking cigarettes "should be encouraged to switch to the least harmful form of tobacco product possible," i.e., e-cigarettes or other non-combustible products, because "switching to the exclusive use of e-cigarettes is preferable to continuing to smoke combustible products." The Board's 2019 Regulation will have the opposite effect by, *inter alia*, encouraging e-cigarette consumers to switch to smoke the more harmful and readily available combustible cigarettes instead. The Board, therefore, is deviating from its duty to promote the public health and safety of *all* members (children and adults) of the Barnstable community by removing from convenience and other Retail Tobacco Store shelves the *less harmful* flavored e-cigarette products widely used by adults.

⁶ See <https://www.cancer.org/healthy/stay-away-from-tobacco/e-cigarette-position-statement.html> (last visited June 24, 2019).

58. By taking the majority of e-cigarette products out of Retail Tobacco Stores, the 2019 Regulation will also cause an increase in local illegal sales of e-cigarettes or other non-combustible products, creating an illicit "gray market."

59. The 2019 Regulation relied on misinformation and unwarranted inferences. During the relevant May Workshop and May Hearing, the Board repeatedly heard suggestions from anti-tobacco advocates that underage tobacco consumers are particularly attracted to the flavored tobacco products that the 2019 Regulation would ban from Retail Tobacco Stores. On November 15, 2018, however, FDA Commissioner Scott Gottlieb, M.D., issued a statement in which he recognized that "mint- and menthol-flavored ENDS [electronic nicotine delivery systems] are more popular with adults than with kids."⁷ Commissioner Gottlieb went on to recognize that "[a]ny approach to mint- and menthol-flavored ENDS must acknowledge the possibility that the availability of these flavors in ENDS may be important to adult smokers seeking to transition away from cigarettes." Dr. Gottlieb expressly warned against creating "a situation where the combustible products have features that make them more attractive than the non-combustible products" or "a situation where those who currently use menthol-flavored cigarettes might find it less attractive to switch completely to an e-cigarette." The 2019 Regulation disregards the FDA Commissioner's warning and creates precisely such a situation.

60. There is no conceivable harm to the Board if it is enjoined, preliminarily or permanently, from enacting the 2019 Regulation. Alternatively, in the event that the 2019 Regulation goes into effect, menthol, mint, and wintergreen flavored tobacco and other flavored products, including e-cigarettes, will no longer be available for purchase at the Plaintiffs' Retail Tobacco Stores, irreparably damaging the Plaintiffs' businesses and customer relationships.

⁷ <https://www.fda.gov/NewsEvents/Newsroom/PressAnnouncements/ucm625883.htm> (last visited June 20, 2019).

61. Enjoining the Board will not adversely affect the public as the 2019 Regulation still allows flavored tobacco and nicotine products to be sold in the Town of Barnstable within Adult-Only Retail Tobacco Stores, along with other tobacco products which may continue to be sold at both Retail Tobacco Stores and Adult-Only Retail Tobacco Stores.

Claims for Relief

COUNT I:

Declaratory Relief Pursuant to M.G.L. c. 231A

62. This claim incorporates paragraphs 1-61 above.

63. There exists a true controversy between Plaintiffs and Defendants concerning, *inter alia*, the legality of the 2019 Regulation.

64. The Plaintiffs request that the Court declare that the 2019 Regulation is unlawful, ultra vires, arbitrary, capricious, an abuse of discretion and unsupported by substantial evidence.

65. Further, the Plaintiffs request that the Court declare each of the Plaintiffs' full legal rights and interest in making sales of combustible and non-combustible menthol, mint, and wintergreen tobacco and related products, including e-cigarettes pursuant to a duly-issued tobacco license.

COUNT II:

Certiorari Review Pursuant to M.G.L. c. 249, § 4

66. This claim incorporates paragraphs 1-65 above.

67. As averred above, the 2019 Regulation must be set aside as it is based upon an error of law, is arbitrary and capricious, ultra vires, is an abuse of discretion, and is otherwise not in accordance with law.

68. Pursuant to M.G.L. c. 249, § 4, this Honorable Court should compel the Board to produce the full, accurate and complete notices of the May Workshop, the May Hearing, the June

Meeting, the full record of the Board's activities and communications in connection with the May Workshop, the May Hearing, and the June Meeting, and the full record of the proceedings at the May Workshop, the May Hearing, the June Meeting, including the Board's vote on the 2019 Regulation.

69. Pursuant to M.G.L. c. 249, § 4, this Honorable Court has discretionary power to issue relief in the nature of certiorari review to correct errors committed by the Board, including but not limited to, quashing the Board's action and setting aside the 2019 Regulation, or in the absence of the Court finding any procedural or other irregularities, improprieties, pre-textual actions or bias on or before the May Workshop, the May Hearing or the June Meeting, compelling remand for further public hearing or such other remedies.

Prayer for Relief

WHEREFORE, the Plaintiffs respectfully request that this Honorable Court award the Plaintiffs relief as follows:

(1) Enter a declaratory judgment to the effect that: (a) the Board's action deprived the Plaintiffs of their civil rights and due process; (b) the 2019 Regulation is ultra vires, arbitrary, capricious, an abuse of discretion, and contrary to law; and (c) a permanent injunction should issue prohibiting the Board and/or the Town of Barnstable from enforcing the 2019 Regulation;

(3) Set aside the 2019 Regulation as null and void;

(4) Award Plaintiffs compensatory and punitive damages against the Board in an amount to be determined at trial;

(5) Award the Plaintiffs their costs and attorneys' fees of this action; and

(6) Order such further relief as is deemed just and proper.

Respectfully submitted,

Plaintiffs,

OHMHARSH CORP. d/b/a AM PM
CONVENIENCE STORE, CHETAN PATEL, M.A.
GENERAL, INC., d/b/a SEA STREET FOOD
MART, ZAHID RASHID, NOOR, INC. d/b/a
HYANNIS CONVENIENCE STORE, and
MUHAMMAD RASHID,

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DATED: June 27, 2019

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Exhibit A

Chapter 371. Smoking

[HISTORY: Adopted by the Town of Barnstable Board of Health as indicated in article histories. Amendments noted where applicable.]

GENERAL REFERENCES

Noncriminal disposition — See Ch. 1, Art. I.

Alcoholic beverages — See Ch. 20.

Fee for tobacco sales permit — See Ch. 318.

ARTICLE I. Definitions.

§ 371-1. As used in this article, the following terms shall have the meanings indicated:

ADULT ONLY RETAIL TOBACCO STORE

An establishment which is not required to possess a retail food permit whose primary purpose is to sell or offer for sale to consumers, but not for resale, tobacco products and paraphernalia in which the sale of other products is merely incidental, and in which the entry of persons under the age of 21 is prohibited at all times, and maintains a valid permit for the retail sale of tobacco products as required to be issued by the Barnstable Board of Health.

BUSINESS AGENT

An individual who has been designated by the owner or operator of any establishment to be the manager or otherwise in charge of said establishment.

COUPON

Any card, paper, note, form, statement, ticket or other issue distributed for commercial or promotional purposes to be later surrendered by the bearer so as to receive an article, service or accommodation without charge or at a discount price.

EDUCATIONAL INSTITUTION

Any public or private college, school, professional school, scientific or technical institution, university or other institution furnishing a program of higher education.

ELECTRONIC SMOKING DEVICE

Any product that can deliver nicotine to the user through inhalation of vapor or aerosolization. "Electronic smoking device" includes any component part of such product, including liquid for use in the device regardless of whether the liquid contains nicotine, whether sold separately. This term includes such devices whether they are manufactured as e-cigarettes, e-cigars e-pipes or under any other product name. It does not include any product that has been approved by the United States Food and Drug Administration for sale as a tobacco cessation product and is being marketed and sold solely for the approved purpose.

EMPLOYEE

A person who performs services for wages or other consideration.

EMPLOYER

A person, partnership, association, corporation, trust, or other organized group, including the County of Barnstable and any department or agency thereof, and any municipal entity, which utilizes the services of one (1) or more employees.

ENCLOSED

A space bounded by walls, with or without windows or fenestrations, continuous from floor to ceiling and enclosed by one (1) or more doors, including but not limited to an office, function room or hallway.

HOTELS, MOTELS, BED & BREAKFASTS AND LODGING HOMES

A temporary dwelling as defined in G.L. chapter 64G, Section 1.

LIQUID NICOTINE CONTAINER

A bottle or other vessel which contains nicotine in liquid or gel form, whether combined with another substance or substances, for use in a tobacco product, as defined herein. The term does not include a container containing nicotine in a cartridge that is sold, marketed, or intended for use in a tobacco product, as defined herein, if the cartridge is prefilled and sealed by the manufacturer and not intended to be opened by the consumer or retailer.

LISTED OR NON-DISCOUNTED

The higher of the price listed for a tobacco product on its package or the price listed on any related shelving, posting, advertising or display at the place where the tobacco product is sold or offered for sale plus all applicable taxes if such taxes are not included in the state price, and before the application of any discounts or coupons.

MEMBERSHIP ASSOCIATION

A not-for-profit entity that has been established and operates for a charitable, philanthropic, civic, social, benevolent, educational, religious, athletic, recreation or similar purpose, and is comprised of members who collectively belong to:

- i. a society, organization or association of a fraternal nature that operates under the lodge system, and having one (1) or more affiliated chapters or branches incorporated in any state; or
- ii. a corporation organized under Massachusetts General Laws Chapter 180; or
- iii. an established religious place of worship or instruction whose real or personal property is exempt from taxation;
- iv. a veterans' organization incorporated or chartered by the Congress of the United States, or otherwise, having one (1) or more affiliated chapters or branches incorporated in any state.

MINIMUM LEGAL SALES AGE

The age an individual must be before that individual can be sold a tobacco product in Barnstable.

NON-RESIDENTIAL ROLL-YOUR-OWN (RYO) MACHINE

A mechanical device made available for use (including to an individual who produces cigars, cigarettes, smokeless tobacco, pipe tobacco, or roll-your-own tobacco solely for the individual's own personal consumption or use) that is capable of making cigarettes, cigars or other tobacco products. RYO machines located in private homes used for solely personal consumption are not Non-Residential RYO machines.

PERMIT HOLDER

Any person engaged in the sale or distribution of tobacco products who applies for and receives a tobacco product sales permit or any person who is required to apply for a Tobacco Product Sales Permit pursuant to these regulations, or his or her business agent.

PERSON

Any individual, firm, partnership, association, corporation, company or organization of any kind, including but not limited to, an owner, operator, manager, proprietor or person in charge of any establishment, business or retail store.

SELF-SERVICE DISPLAY

Any display from which customers may select a tobacco product, as defined herein, without assistance from an employee or store personnel.

SCHOOLS

Public or private elementary or secondary schools.

SMOKING

The lighting of a cigar, cigarette, pipe or other tobacco product or possessing a lighted cigar, cigarette, pipe or other tobacco or non-tobacco product designed to be combusted and inhaled.

SMOKING BAR

An establishment that primarily is engaged in the retail sale of tobacco products for consumption by customers on the premises and is required by Mass. General Law Ch. 270, §22 to maintain a valid permit to operate a smoking bar issued by the Massachusetts Department of Revenue. "Smoking bar" shall include, but not be limited to, those establishments that are commonly known as "cigar bars", "hookah bars" and "vape bars".

TOBACCO PRODUCT

Any product containing, made, or derived from tobacco or nicotine that is intended for human consumption, whether smoked, chewed, absorbed, dissolved, inhaled, snorted, sniffed, or ingested by any other means, including, but not limited to: cigarettes, cigars, little cigars, chewing tobacco, pipe tobacco, snuff, or electronic cigarettes, electronic cigars, electronic pipes, electronic hookah, or other similar products, regardless of nicotine content, that rely on vaporization or

aerosolization. "Tobacco product" includes any component or part of a tobacco product. "Tobacco product" does not include any product that has been approved by the United States Food and Drug Administration either as a tobacco use cessation product or for other medical purposes and which is being marketed and sold or prescribed solely for the approved purpose.

TOBACCO VENDING MACHINE

An automated or mechanical or electrical device self-service device, which upon insertion of money, tokens or any other form of payment, dispenses or makes cigarettes or, any other tobacco products, as defined herein.

WORKPLACE

An indoor. Structure or facility or a portion thereof, in which one (1) or more employees perform services for compensation for an employer, other enclosed spaces rented to or otherwise used by the public; and where the employer has the right or authority to exercise control over the space..

Article II. Findings and purpose.

§ 371-2 A.

The 1986 Surgeon General's Report on "The Health Consequences of Involuntary Smoking" clearly documents that nonsmokers are placed at risk for developing disease as a result of exposure to environmental tobacco smoke or secondhand smoke. In 1993, the Environmental Protection Agency classified environmental tobacco smoke as a known human carcinogen. Numerous studies have found that tobacco smoke is a major contributor to indoor air pollution, and that breathing secondhand smoke is a cause of disease, including lung cancer, in nonsmokers.

B.

Exposure to environmental tobacco smoke presents a serious and substantial public health risk. Of particular concern is the workplace environment of nonsmokers, where they may be subjected to sustained, involuntary exposure. At special risk are children, the elderly, individuals with cardiovascular disease, and individuals with impaired respiratory function, including asthmatics and those with obstructive airway disease.

C.

The U.S. Department of Health and Human Services has concluded that nicotine is as addictive as cocaine or heroin and the Surgeon General found that nicotine exposure during adolescence, a critical window for brain development, may have lasting adverse consequences for brain development. In addition, the Institute of Medicine (IOM) concluded that raising the minimum age of legal access to tobacco products to 21 will likely reduce tobacco initiation, particularly among adolescents 15 - 17, which would improve health across the lifespan and save lives. Research on raising the minimum legal drinking age to 21 has reduced alcohol consumption among youth and protected drinkers from long-term negative outcomes in adulthood, including alcohol and other drug dependence.

D.

Studies have shown that vending machines afford an opportunity for unauthorized sale of cigarettes to minors. Evidence further demonstrates that tobacco is extremely addictive. Approximately 80% of all smokers begin smoking before age 18 and more than 3,000 young people begin smoking every day in this nation.

E.

The Cape Cod Regional Tobacco Control Program Advisory Panel (comprised of representatives of the Boards of Health from the Towns of Barnstable, Bourne, Brewster, Chatham, Dennis, Eastham, Falmouth, Harwich, Mashpee, Nantucket, Orleans, Provincetown, Sandwich, Truro, Wareham, Wellfleet and Yarmouth) urges all public places and workplaces to become voluntarily smokefree before November 1, 1996.

F.

Environmental tobacco smoke is a leading public health problem in the Town of Barnstable and throughout the United States; and

G There exists conclusive evidence that environmental tobacco smoke causes cancer, cardiovascular disease, respiratory disease, negative birth outcomes, allergies and irritations to the eyes, ears nose and throat of both smokers and nonsmokers; and

H.

The Environmental Protection Agency (EPA) has designated environmental tobacco smoke to be a Class A carcinogen, similar to radon and asbestos, with no known safe level of exposure; and

I.

Children, the elderly, individuals with cardiovascular disease, individuals with impaired respiratory function, and asthmatics are among those people who are particularly susceptible to the harmful effects of inhaling environmental tobacco smoke.

§ 371-3. Authority.

This regulation is promulgated under the authority granted to the Barnstable Board of Health pursuant to Massachusetts General Laws Chapter 111, Section 31 that "[b]oards of health may make reasonable health regulations." It is also promulgated pursuant to Massachusetts General Laws Chapter 270, Section 22(j) which states in part that "[n]othing in this section shall permit smoking in an area in which smoking is or may hereafter be prohibited by law including, without limitation: any other law or health regulation. Nothing in this section shall preempt further limitation of smoking by the commonwealth or political subdivision of the commonwealth."

Article III: Smoking in Public Places

§ 371-4. Smoking Prohibited

- a) It shall be the responsibility of the employer to provide a smoke-free environment for all employees working in an enclosed workplace as well as those workplaces listed in subsection (c) below.
- b) Smoking is hereby prohibited in Barnstable in accordance with M.G.L. Ch. 270, §22 (commonly known as the "Smoke-Free Workplace Law").
- c) Pursuant to M.G.L. Ch. 270, §22(j) smoking is also hereby prohibited in:
 1. The area within ten (10) feet of any municipal building entranceway accessible to the public.

2. Municipal-owned parks and playgrounds.
3. Municipal-owned athletic fields.
4. Municipal-owned beaches and other swimming areas.
5. Public transportation, including bus and taxi waiting areas.

- d) The use of e-cigarettes is prohibited wherever smoking is prohibited per Massachusetts law and Section 4(c) of this regulation.

§ 371-5 Posting Notice of Smoking Prohibition:

An owner, Employer, or person having control of a premises where Smoking is prohibited shall conspicuously display upon the premises "No Smoking" signs or the international No Smoking symbol (consisting of a pictorial representation of a burning cigarette enclosed in a red circle with a red bar across it). These signs shall be comparable in size to the sign provided by the Massachusetts Department of Public Health, which are available from the Barnstable Board of Health.

§371-6 Exceptions:

Notwithstanding the provisions of this regulation, the Smoking of tobacco products may be permitted in the following places and/or circumstances:

- A. Private residences, except those portions used as a childcare or health care office when operating as such.
- B. A guest room in a hotel, motel, inn, bed and breakfast or lodging home rented to guests that are designated as "smoking rooms".
- C. An outdoor location where the public may gather that is under Federal or State jurisdiction, which has a policy on smoking accepted by the Board of Health.
- D. An outdoor location where the public may gather that is owned and under the control of a Membership Association, which has a policy on smoking accepted by the Board of Health.
- E. Any smoking bar in existence as of February 4, 2000 which obtained a variance from the Board of Health. No pre-existing smoking bar shall be permitted to either sell tobacco products to minors or to allow minors to use tobacco products on the premises.

§371.7 Penalties

A. Violations of this smoking regulation may be enforced by the provisions of MGL Chapter 40, § 21D et seq. noncriminal disposition and by Chapter 1, General Provisions, Article 1, regarding noncriminal dispositions.

B. Any person who knowingly violates any provision of this, shall be punished by a fine of up to \$50 for each offense.

C. Any proprietor(s), employer or other person(s) in charge of a public place, who fail(s) to comply with these regulations shall be subject to the following actions for each

1. A warning shall be issued for a first offense.
2. A fine of up to \$100 may be issued for the second offense, up to \$200 for a third offense, up to \$300 for a fourth offense, and up to \$300 for any subsequent offense;
3. No provision, clause or sentence of this paragraph of this Regulation shall be interpreted as prohibiting any Town of Barnstable Department or Board from suspending

or revoking licenses or permits issued by and within the jurisdiction of such Departments for repeated violations of this regulation.

D. In addition to the remedies provided by Subsections B and C above, the Board of Health or any person aggrieved by the failure of the proprietor or other person in charge of a public place or workplace to comply with any provision of this article may apply for injunctive relief to enforce the provisions of this article in any court of competent jurisdiction.

E. The Board of Health or its designee(s) shall enforce this regulation.

§ 371-8. Scyzerability.

If any provision of these regulations is declared invalid or unenforceable, the other provisions shall not be affected thereby but shall continue in full force and effect.

ARTICLE IV. SALE OF TOBACCO PRODUCTS

§ 371-9. Sale and distribution of tobacco products.

1. No person shall sell or provide a tobacco product, as defined herein, to a person under the minimum legal sales age. The minimum legal sales age in Barnstable is 21.

2. Identification: Each person selling or distributing tobacco products, as defined herein, shall verify the age of the purchaser by means of a valid government-issued photographic identification containing the bearer's date of birth that the purchaser is 21 years old or older. Verification is required for any person under the age of 27.

3. All retail sales of tobacco products, as defined herein, must be face-to-face between the seller and the buyer and occur at the permitted location.

E. Tobacco Product Sales Permit:

1. No person shall sell or otherwise distribute tobacco products, as defined herein, within the Town of Barnstable without first obtaining a Tobacco Product Sales Permit issued annually by the Barnstable Board of Health. Only owners of establishments with a permanent, non-mobile location in Barnstable are eligible to apply for a permit and sell tobacco products, as defined herein, at the specified location in Barnstable.

2. As part of the Tobacco Product Sales Permit application process, the applicant will be provided with the Barnstable regulation. Each applicant is required to sign a statement declaring that the applicant has read said regulation and that the applicant is responsible for instructing any and all employees who will be responsible for tobacco product sales regarding federal, state and local laws about the sale of tobacco and this regulation.

3. Each applicant who sells tobacco products is required to provide proof of a current Tobacco Retailer License issued by the Massachusetts Department of Revenue, when required by state law, before a Tobacco Product Sales Permit can be issued. Applicant may be asked to provide evidence that a legitimate business transfer or business purchase has taken place.

4. A separate permit, displayed conspicuously, is required for each retail establishment selling tobacco products, as defined herein. The fee shall be determined by the Barnstable Board of Health annually.

5. A Tobacco Product Sales Permit is non-transferable. A new owner of an establishment that sells tobacco products, as defined herein, must apply for a new permit. No new permit will be issued unless and until all outstanding penalties incurred by the previous permit holder are satisfied in full.

6. Issuance of a Tobacco Product Sales Permit shall be conditioned on an applicant's consent to unannounced, periodic inspections of his/her retail establishment to ensure compliance with this regulation.

7. A Tobacco Product Sales Permit will not be renewed if the permit holder has failed to pay all fines issued and the time period to appeal the fines has expired and/or the permit holder has not satisfied any outstanding permit suspensions.

8. A Tobacco Product Sales Permit will not be renewed if the permit holder has sold a tobacco product to a person under the M.L.S.A. (§D.1) three times within the previous permit year and the time period to appeal has expired. The violator may request a hearing in accordance with subsection 4 of the Violations section.

9. A Tobacco Product Sales Permit will not be issued to any new applicant for a retail location within five hundred (500) feet of a public or private elementary or secondary school as measured by a straight line from the nearest point of the property line of the school to the nearest point of the property line of the site of the applicant's business premises.

§ 371-10. Inspection procedures.

A.
Refusal, notification of right to access, and final request for access. If a person denies access to the Board of Health or its agent, the Board of Health or its agent shall:

(1)

Inform the person that:

(a)

The permit holder is required to allow access to the Board of Health or its agent;

(b)

Access is a condition of the acceptance and retention of a tobacco sales permit; and

(c)

If access is denied, an order issued by the appropriate authority allowing access, hereinafter referred to as an inspection order, will be obtained according to law; and

(2)

Make a final request for access.

B.

Refusal, reporting. If, after the Board of Health or its agent presents credentials and provides notice, explains the authority upon which access is requested, and makes a final request for access, the permit holder continues to refuse access, the Board of Health or its agent shall provide details of the denial of access on an inspection report form.

C.

Tobacco sales compliance checks, inspections and investigations.

(1)

All permitted premises shall be subject to an inspection or to a tobacco sales compliance check by the Board of Health or its agent.

(2)

Any person who hinders or delays the Board of Health or its agent in the performance of the his/her duties or who refuses to admit to, or locks out any such agent from any place which such agent is authorized to conduct a compliance check or inspection or who refuses to give to such agent such information as may be required to give to proper enforcement of the General Laws, shall be punished by a fine of not less than \$50 and not more than \$200.

D.

Inspection order to gain access. If denied access to an establishment which sells tobacco products for an authorized purpose, and after complying with Subsection A, the Board of Health or its agent may issue, or apply for the issuance of, an inspection order to gain access as provided by law.

E.

Responsibilities of tobacco sales permit holder. The tobacco sales permit holder is responsible for the proper management of the premises so that unlawful acts do not occur on the premises and so that the premises does not become a threat to the public welfare or public safety. When violations of the permit or of the law are brought to the attention of the Board of Health, a disciplinary hearing will be held and, as a result of evidence brought to the attention of the Board of Health at the hearing, the Board of Health may modify, suspend, or revoke the permit.

F.

Issuing noncriminal ticket citation or inspection report and obtaining acknowledgement of receipt. At the conclusion of the tobacco sales compliance check or tobacco sales establishment inspection and according to law, the Board of Health or its agent shall provide a copy of the completed noncriminal ticket citation or notice of the violations to the permit holder or the person in charge, and request a signed acknowledgement of receipt.

G.

Refusal to sign acknowledgement. The Board of Health or its agent shall:

(1)

Inform a person who declines to sign an acknowledgement of receipt of a noncriminal ticket citation or inspectional findings as specified in Subsection F that:

(a)

An acknowledgement of receipt is not an agreement with findings;

(b)

Refusal to sign an acknowledgement of receipt will not affect the permit holder's obligation to correct the violations noted in the inspection report within the time frames specified; and

(c)

A refusal to sign an acknowledgement of receipt is noted in the inspection report and conveyed to the Board of Health's historical record for the establishment; and

(2)

Make a final request that the person in charge sign an acknowledgement receipt of a noncriminal ticket citation or inspectional findings.

§371-11 Other Provisions

A

Free Distribution and Coupon Redemption: No person shall:

1. Distribute or cause to be distributed, any free samples of tobacco products, as defined herein;

2. Accept or redeem, offer to accept or redeem, or cause or hire any person to accept or redeem or offer to accept or redeem any coupon that provides any tobacco product, as defined herein, without charge or for less than the listed or non-discounted price; or
3. Sell a tobacco product, as defined herein, to consumers through any multi-pack discounts (e.g., "buy-two-get-one-free") or otherwise provide or distribute to consumers any tobacco product, as defined herein, without charge or for less than the listed or non-discounted price in exchange for the purchase of any other tobacco product.

B

Out-of-Package Sales:

1. The sale or distribution of tobacco products, as defined herein, in any form other than an original factory-wrapped package is prohibited, including the repackaging or dispensing of any tobacco product, as defined herein, for retail sale. No person may sell or cause to be sold or distribute or cause to be distributed any cigarette package that contains fewer than twenty (20) cigarettes, including single cigarettes.
2. Permit holders who sell Liquid Nicotine Containers must comply with the provisions of 310 CMR 30.000, and must provide the Barnstable Board of Health with a written plan for disposal of said product, including disposal plans for any breakage, spillage or expiration of the product.
3. All permit holders must comply with 940 CMR 21.05 which reads: "It shall be an unfair or deceptive act or practice for any person to sell or distribute nicotine in a liquid or gel substance in Massachusetts after March 15, 2016 unless the liquid or gel product is contained in a child-resistant package that, at a minimum, meets the standard for special packaging as set forth in 15 U.S.C. §§1471 through 1476 and 16 CFR §1700 et. Seq."
4. No permit holder shall refill a cartridge that is prefilled and sealed by the manufacturer and not intended to be opened by the consumer or retailer.

C

Self-Service Displays:

All self-service displays of tobacco products, as defined herein, are prohibited. All humidors including, but not limited to, walk-in humidors must be locked.

D

Vending Machines:

All vending machines containing tobacco products, as defined herein, are prohibited.

E.

Prohibition of the Sale of Tobacco Products by Educational Institutions:

No educational institution located within the Town of Barnstable shall sell or cause to be sold tobacco products, as defined herein. This includes all educational institutions as well as any retail establishments that operate on the property of an educational institution.

F.

Incorporation of State Laws and State Regulations:

1. The sale or distribution of tobacco products, as defined herein, must comply with those provisions found at M.G.L. Ch. 270, §§6, 6A, 7 and M.G.L. Ch. 112, §61A.
2. The sale or distribution of tobacco products, as defined herein, must comply with those provisions found at 940 CMR 21.00 ("Sale and Distribution of Cigarettes, Smokeless Tobacco Products, and Electronic Smoking Devices in Massachusetts") and 940 CMR 22.00 ("Sale and Distribution of Cigars in Massachusetts").

§ 371-11 Violations and penalties.

A.

Violations of this smoking regulation will be subjected to the provisions of the regulation of the Town of Barnstable regarding noncriminal disposition.^{III}

B.

Any person who knowingly violates any provision of this regulation, or who smokes in a municipal area subject to regulation, in which a "Smoking Prohibited by Law" sign or its equivalent is conspicuously displayed, shall be punished by a fine of \$50 for each offense.

C.

Any proprietor(s) or other person(s) in charge of a public place or workplace, including municipal entities, who fail(s) to comply with these regulations shall be subject to the following actions for each offense:

(1)

A warning shall be issued for a first offense. A fine of \$100 may be issued for the second offense, \$200 for a third offense, \$300 for a fourth offense, and \$300 for any subsequent offense; and

(2)

Following the second offense the Board of Health may, after a public hearing, suspend any license for that public place for a period of up to two days for each day of noncompliance or withhold renewal of license. Following a third offense, the Board of Health may suspend an existing permit/license for a period of time determined by the Board of Health until compliance is achieved.

D.

Persons, firms, corporations, or agencies selling tobacco products to minors or selling tobacco products without a tobacco sales permit shall be punished as follows:

- a. In the case of a first violation, a fine of one hundred dollars (\$100.00).
- b. In the case of a second violation within 24 months of the date of the current violation, a fine of two hundred dollars (\$200.00) and the Tobacco Product Sales Permit shall be suspended for up to seven (7) consecutive business days.

c. In the case of three or more violations within a 24-month period, a fine of three hundred dollars (\$300.00) and the Tobacco Product Sales Permit shall be suspended for up to thirty (30) consecutive business days.

d. In the case of four violations or repeated, egregious violations of this regulation, as determined by the Board of Health, within a 24-month period, the Board of Health shall hold a hearing in accordance with subsection 4 of this section and may permanently revoke a Tobacco Product Sales Permit.

2. Failure to cooperate with inspections pursuant to this regulation shall result in the suspension of the Tobacco Product Sales Permit for up to thirty (30) consecutive business days.

3. In addition to the monetary fines set above, any permit holder who engages in the sale or distribution of tobacco products while his or her permit is suspended shall be subject to the suspension of all Board of Health issued permits for up to thirty (30) consecutive business days. Multiple tobacco product sales permit suspensions shall not be served concurrently.

4. The Barnstable Board of Health shall provide notice of the intent to suspend or revoke a Tobacco Product Sales Permit, which notice shall contain the reasons therefor and establish a time and date for a hearing which date shall be no earlier than seven (7) days after the date of said notice. The permit holder or its business agent shall have an opportunity to be heard at such hearing and shall be notified of the Board of Health's decision and the reasons therefor in writing. After a hearing, the Barnstable Board of Health shall suspend or revoke the Tobacco Product Sales Permit if the Board of Health finds that a violation of this regulation occurred. All tobacco products, as defined herein, shall be removed from the retail establishment upon suspension or revocation of the Tobacco Product Sales Permit. Failure to remove all tobacco products, as defined herein, shall constitute a separate violation of this regulation.

E.

In addition to the remedies provided above, the Board of Health may apply for injunctive relief to enforce the provisions of this article in any court of competent jurisdiction.

§ 371-12. Severability.

If any provision of these regulations is declared invalid or unenforceable, the other provisions shall not be affected thereby but shall continue in full force and effect.

§ 371-13. Other applicable laws.

A.

The Board of Health or its agent shall enforce this regulation. Any violation of these regulations may be enforced and punished by the provisions of Chapter 1, General Provisions, Article 1, Noncriminal Enforcement of Violations, as adopted by the Town of Barnstable.

B.

Any citizen who desires to register a complaint of noncompliance under this regulation may do so by contacting the Public Health Division.

§ 371-14. Effective date.

These amended regulations shall be effective as of December 30, 2018.

Exhibit B



PHONE: 508-636-4044
FAX: 508-790-6104

Town of Barnstable Board of Health

P.O. Box 534, Hyannis MA 02601

Paul J. Canniff, DMD
John Norman
Donald A. Guadagnoli, M.D.

May 29, 2019

LEGAL NOTICE

The Board of Health of the Town of Barnstable Massachusetts in accordance with and under the authority granted by Section 31 of Chapter 111 of the General Laws of the Commonwealth of Massachusetts, hereby announces that during the public hearing held on May 28, 2019, the Board voted unanimously to adopt amendments to Chapter 371 of the Town of Barnstable Code, Smoking.

The following Paragraph "G" is hereby added to Section 371-11 of the Town of Barnstable Code:

G. Sale of Flavored Tobacco Products Prohibited:

No person shall sell or distribute or cause to be sold or distributed any flavored tobacco product, except in smoking bars and adult-only retail tobacco stores.

The following two definitions are hereby added to Section 371-1 of the Town of Barnstable Code:

Characterizing Flavor: A distinguishable taste or aroma, other than the taste or aroma of tobacco, imparted or detectable either prior to or during consumption of a tobacco product or component thereof, including, but not limited to, tastes or aromas relating to fruit, chocolate, vanilla, honey, candy cocoa, dessert, alcoholic beverage, menthol, mint, wintergreen, herb or spice; provided however that no tobacco product shall be determined to have a characterizing flavor solely because of the provision ingredient information or the use of additives or flavorings that do not contribute to the distinguishable taste or aroma of the product

Flavored Tobacco Product: Any tobacco product or component part thereof that contains a constituent that has or produces a characterizing flavor. A public statement, claim or indicia made or disseminated by the manufacturer of a tobacco product, or by any person authorized or permitted by the manufacturer to make or disseminate public statements concerning such tobacco product, that such tobacco product has or produces a characterizing flavor shall constitute presumptive evidence that the tobacco product is a Flavored Tobacco Product.

These amendments to Chapter 371 of the Town of Barnstable Code go into effect on June 29, 2019. Copies of the amendments are available at the Public Health Division Office at 200 Main Street Hyannis, Massachusetts and will be posted online at www.townofbarnstable.us

Paul J. Canniff, D.M.D., Chairman
John Norman
Donald A. Guadagnoli, M.D.

TOWN OF BARNSTABLE
BOARD OF HEALTH